STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 14, 2014
v	No. 313455 Macomb Circuit Court
CHARLES EDWARD JACKSON III, Defendant-Appellant.	LC No. 2012-001424-FC

Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of armed robbery, MCL 750.529; felon in possession of a firearm, MCL 750.224f; and two counts of possession of a firearm at the time of the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced him to 15 to 25 years' imprisonment for the armed robbery conviction, two to five years' imprisonment for the felon-in-possession conviction, and two years' imprisonment for each felony-firearm conviction. We affirm.

Defendant first contends that defense counsel was ineffective for failing to consult with or hire a DNA expert for trial and that defendant's due process rights were violated because the state did not provide defendant with a DNA expert. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review for clear error the trial court's findings of fact and we review de novo questions of constitutional law. *Id*. Because defendant's ineffective-assistance argument is unpreserved, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Effective assistance of counsel is presumed and the challenging defendant bears the heavy burden of proving otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). In order to establish ineffectiveness of counsel, a defendant must show that (1) counsel's performance did not meet an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed; and (3) the result that did occur was fundamentally unfair or unreliable. *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). This Court will not substitute its judgment for that of trial counsel on matters of strategy, nor will it employ the

benefit of hindsight to assess the competence of counsel. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defense counsel has wide discretion regarding matters of trial strategy, because counsel may be required to take calculated risks to try to win a case. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012). "Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). "Furthermore, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to reasonably investigate a case can constitute ineffective assistance of counsel, *People v Trakhtenberg*, 493 Mich 38, 52-53; 826 NW2d 136 (2012), but only if the defendant can show prejudice resulting from the lack of preparation, *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

Defendant argues that defense counsel was ineffective for failing to consult or hire a DNA expert for trial because defense counsel was not an expert in DNA matters, DNA evidence was the only evidence tying defendant to the crime scene, and defense counsel's failure to consult a DNA expert deprived defendant of a substantial defense. At trial, defense counsel cross-examined Jennifer Morgan, a Michigan State Police forensic scientist, regarding her analysis of the DNA evidence in the glove found at the scene of the crime. Morgan admitted that she found at least two DNA donors in the glove and that she could not determine how long defendant's DNA had been in the glove or if defendant was the last person to wear the glove.

Defense counsel was not ineffective for failing to consult or hire a DNA expert. Defense counsel's decision not to call such an expert at trial is presumed to be sound trial strategy. *Russell*, 297 Mich App at 716. Defendant was not deprived of a substantial defense, because defense counsel adequately questioned Morgan to the point of her admitting that multiple people contributed DNA to the glove, she did not know for how long defendant's DNA had been on the glove, she did not do statistics on the DNA found in the glove as it would pertain to one of defendant's relatives, and DNA can be artificially introduced to evidence. This questioning was sufficient to preserve defendant's defense—that the DNA results showing defendant as a match were erroneous. Thus, defendant was not deprived of a substantial defense by defense counsel's decision not to call a DNA expert.

Second, nothing in the record below shows that defense counsel failed to reasonably investigate the case simply because he failed to consult a DNA expert. Defense counsel's questioning of both Morgan and Melinda Jackson, another forensic scientist with the Michigan State Police, showed a sufficient knowledge of the medical and laboratory procedures surrounding DNA testing, as well as the inherent difficulties in finding exact DNA matches. Defense counsel's cross-examinations of the witnesses showed sufficient knowledge and competency in the area of DNA testing to adequately question the forensic scientists' findings. Defense counsel's performance met an objective standard of reasonableness under prevailing professional norms. *Lockett*, 295 Mich App at 187.

Further, defendant was not prejudiced by defense counsel's alleged failure to hire or consult a DNA expert. In order to prove prejudice, defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been

different and that the result that did occur was fundamentally unfair or unreliable. *Id*. Here, in addition to the DNA evidence, the prosecution proffered voluminous circumstantial evidence that defendant was the armed robber, in the form of ski masks, ammunition, gloves, and a duffle bag found in defendant's residence, and a pickup truck found at defendant's residence that was consistent with the description of the vehicle from the scene. Further, even if defendant had hired an independent DNA expert, the prosecution still proffered Morgan's testimony and report, providing that there was only a one-in-trillions chance that a member of the general public, other than defendant, could be a match with the DNA found in the glove left at the scene. Therefore, defendant cannot show that the outcome of the proceeding would have been different had defense counsel consulted or hired a DNA expert. *Id*.

Defendant contends that the state was required to appoint a DNA expert to assist his defense and that the failure to do so violated his due-process rights. Constitutional questions, such as those involving due process, are generally reviewed by this Court de novo. *People v Sadows*, 283 Mich App 65, 67, 69; 768 NW2d 93 (2009). Unpreserved claims of constitutional error are reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). "Under the plain error rule, defendants must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). The third element generally requires a showing of prejudice—that the error affected the outcome of the proceedings. *Id*. Finally, "reversal is only warranted if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *Id*. at 274.

MCL 775.15 provides, in pertinent part:

> If any person accused of any crime or misdemeanor, and about to be tried therefor in any court of record in this state, shall make it appear to the satisfaction of the judge presiding over the court wherein such trial is to be had, by his own oath, or otherwise, that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial, giving the name and place of residence of such witness, and that such accused person is poor and has not and cannot obtain the means to procure the attendance of such witness at the place of trial, the judge in his discretion may, at a time when the prosecuting officer of the county is present, make an order that a subpoena be issued from such court for such witness in his favor, and that it be served by the proper officer of the court.

A defendant must "demonstrate a nexus between the facts of the case and the need for an expert." *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003) (internal quotation marks and citations omitted).

Here, defendant and defense counsel never requested the appointment of a DNA expert. In fact, this very failure to request such is the basis of defendant's claim that defense counsel was ineffective. Because no request was ever made, defendant clearly did not establish before the trial court a nexus between the case and the need for a DNA expert, and therefore, the trial court did not err in failing to appoint one. See, generally, *id.* at 443-444 (holding that when a defendant fails to explain how an expert would assist his case, the defendant falls short of

satisfying his burden of showing that he could not proceed safely to trial without expert assistance).

Defendant next contends that he was convicted on the basis of legally insufficient evidence because DNA evidence is inherently unreliable and DNA was the only evidence linking defendant to the crime scene. We disagree.

Due process requires that the evidence show guilt beyond a reasonable doubt in order to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This Court applies a de novo review to challenges to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). This Court views the evidence in the light most favorable to the prosecution and must determine whether a rational trier of fact could have found that all the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). This Court must afford deference to the jury's special ability to assess the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Defendant's argument on appeal that there was insufficient evidence to convict him of the crimes charged hinges on his contention that DNA evidence is unreliable.

"The elements of armed robbery are: (1) an assault and (2) a felonious taking of property from the victim's presence or person (3) while the defendant is armed with a weapon." *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). At trial, the prosecution provided evidence that a masked man entered Tivoli's Pizza; fired a handgun between Fabio Evoala and Giuseppe Gaglio, two employees of Tivoli's Pizza; told Evoala to give him "all [the] f****** money;" and took approximately $1,270 from Evoala and the restaurant. The prosecution also provided evidence that DNA found on a glove left at the scene of the crime matched defendant's DNA and numerous corroborating items were found at defendant's residence.

The felon-in-possession statute provides, in pertinent part: "[A] person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state . . . ." MCL 750.224f(1). The elements of being a felon in possession of a firearm are: "First, the defendant possessed or used a firearm in this State. Second, that the defendant was convicted of a specified felony which precludes him from being eligible to possess or use a firearm in this State . . . ." See *People v Dupree*, 284 Mich App 89, 117 n 1; 771 NW2d 470 (2009) (opinion of MURRAY, J.). The parties stipulated that defendant had a prior felony conviction that applied to the felon-in-possession charge. Further, and as noted above, the prosecution provided evidence that a masked man entered Tivoli's Pizza, fired a handgun that he had in his possession, and took approximately $1,270 from the restaurant. Again, the prosecution provided evidence that DNA found on the glove left at the scene of the crime matched defendant's DNA and numerous corroborating items were found at defendant's residence.

MCL 750.227b provides, in pertinent part: "A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, is guilty of a felony . . . ." "The felony-firearm statute applies whenever a person carries or has a firearm in his possession when committing or attempting to commit a felony." *People v Moore*, 470 Mich

56, 62; 679 NW2d 41 (2004). Defendant was charged with two counts of felony-firearm, relating to the charges of armed robbery and felon-in-possession. Again, the prosecution elicited testimonial evidence that a man entered Tivoli's Pizza carrying a handgun and took approximately $1,270 from the store. The prosecution also provided evidence that DNA found on the glove left at the scene of the crime matched defendant's DNA and numerous corroborating items were found at defendant's residence.

Defendant contends that, based upon a report issued by the National Academy of Sciences and a law review article published in the Virginia Law Review, DNA and forensic evidence have been shown to be unreliable because the evidence is not routinely scrutinized, is commonly contaminated or is the result of human error, and commonly involves methodologically invalid testimony. However, at trial, Morgan testified that the Michigan State Police forensics lab follows all standard procedures for DNA testing, she took precautions to guarantee that the DNA evidence was not contaminated, and that she has been tested and recertified in forensic science throughout her career. This Court has previously stated that "[w]e do not require scientific tests to be infallible, but only that reasonable certainty follow from them." *People v Adams*, 195 Mich App 267, 276; 489 NW2d 192 (1992), mod and remanded on other grounds 441 Mich 916 (1993). Further, under MRE 702, an expert witness may testify regarding scientific knowledge "if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Morgan did testify regarding the statistical evidence underlying her conclusion that defendant matched the DNA found on the glove and testified that she followed standard methods of DNA testing.

Defendant provided no evidence that the glove or defendant's buccal swab provided to Morgan was contaminated in any way or that Morgan's methodology was invalid. Defense counsel adequately cross-examined Morgan to determine whether the DNA test results were reliable, but this Court must afford deference to a jury's special ability to assess the credibility of the witnesses. *Wolfe*, 440 Mich at 514-515. Although defense counsel was able to show some of the minor limitations of DNA testing, when viewing the evidence in the light most favorable to the prosecution, the DNA evidence was credible and there was sufficient evidence to convict defendant of all four charges.

Defendant next argues that he is entitled to resentencing because the trial court erred in scoring offense variable (OV) 1, OV 2, and OV 9, and because the trial court violated defendant's Sixth Amendment rights by sentencing defendant based upon facts not proved to a jury beyond a reasonable doubt. We disagree.

To preserve an issue challenging the scoring of the guidelines, the challenging party must raise the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10). Defendant did not challenge the scoring of OV 1, OV 2, or OV 9 at sentencing, nor did he file a motion for resentencing or remand. Further, defendant never challenged the trial judge's use of judicial fact-finding. Therefore this issue is unpreserved on appeal.

When this Court reviews a claim that the scoring of the sentencing guidelines was erroneous, the trial court's findings of fact are reviewed for clear error and must be supported by

a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*. Questions of constitutional law are generally reviewed de novo. *People v Harper*, 479 Mich 599, 610; 739 NW2d 523 (2007). Unpreserved claims of constitutional error are reviewed for plain error. *Carines*, 460 Mich at 764.

We note that defendant provides no supporting arguments or authority for his contention that OV 1, OV 2, and OV 9 were improperly scored. "The mere statement of a party's position without citation of relevant authority is generally insufficient to present an issue for this Court's review. This Court ordinarily declines to review issues for which a party has failed to provide authority, and will not search for authority to support or contradict a party's argument." *People v Harlan*, 258 Mich App 137, 140; 669 NW2d 872 (2003) (citation omitted); see also *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (an appellant may not leave it to the appellate court to unravel the appellant's arguments). Defendant has abandoned the issue.[1]

Defendant argues that the trial court violated his constitutional rights by sentencing him on the basis of facts that were not proved to a jury beyond a reasonable doubt. Recently, this Court addressed this very question in *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013), appeal held in abeyance ___ Mich ___; 846 NW2d 924 (2014). In *Herron*, this Court analyzed the current landscape of due-process concerns regarding sentencing and determined that *Alleyne v United States*, ___ US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), only indicated that judicial fact-finding that triggers an increase in the *mandatory* minimum of a sentence was improper. *Herron*, 303 Mich App at 401-404. This Court stated:

> While judicial fact-finding in scoring the sentencing guidelines produces a recommended range for a minimum sentence of an indeterminate sentence, the maximum of which is set by law, it does not establish a *mandatory minimum*; therefore, the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-finding does not violate due process or the Sixth Amendment's right to a jury trial. [*Id*. at 403-404 (citation omitted).]

Based upon *Herron*'s explicit statement that Michigan's indeterminate sentencing framework is not violative of due process, we find no basis for reversal.

Finally, defendant contends that the trial court erred in failing to award him 32 days of good-time credit for the time he spent in county jail awaiting trial and sentencing. Again, we disagree.

The issue involves statutory interpretation, which this Court reviews de novo. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997).

[1] Even if we were to address the scoring decisions, we would find no basis for a remand. The evidence adequately supported the scores.

MCL 51.281 authorizes a county sheriff to establish rules and regulations for the conduct of prisoners in his custody. MCL 51.282(2) provides, in pertinent part: "Every prisoner whose record shows that there are no violations of the rules and regulations shall be entitled to a reduction from his or her sentence as follows: 1 day for each 6 days of the sentence." There is nothing in the United States Constitution that requires a state to grant good-time credits to prisoners. *Michigan ex rel Oakland Co Prosecutor v Dep't of Corrections*, 199 Mich App 681, 695; 503 NW2d 465 (1993). However, once a state specifically adopts good-time credit provisions and a prisoner earns credit under those provisions, the deprivation of that good-time credit constitutes a "substantial sanction" that may violate due process. *Id.* "[A] court may not deprive a prisoner of good-time credit to which the prisoner may be entitled under statute before that prisoner has even begun serving the term of imprisonment." *People v Cannon*, 206 Mich App 653, 656; 522 NW2d 716 (1994).

In support of his argument, defendant cites *People v Resler*, 210 Mich App 24; 532 NW2d 907 (1995), and *People v Grazhidani*, 277 Mich App 592; 746 NW2d 622 (2008). However, neither case supports the contention that good-time credit may be earned while not serving a sentence but merely awaiting trial. In *Resler*, 210 Mich App at 28, this Court held that "the constitutional guarantee against multiple punishments contemplates good-time credit, but . . . the ultimate decision of whether such protection applies—that is whether the good-time credit may be revoked—lies in the discretion of the Legislature." *Grazhidani* merely stands for the proposition that, in evaluating credits when imposing prison time after a probationary jail sentence, good-time credits actually earned are sufficiently distinguishable from a sentence reduction because of jail overcrowding. *Grazhidani*, 277 Mich App at 599-601. Thus, the case law purported to support defendant's position does not indicate that defendant is entitled to good-time credit. Instead, case law indicates that a defendant held in jail pending trial is *not* entitled to additional credit on his prison sentence. *Resler*, 210 Mich App at 28 ("a sentencing court may not revoke good-time credit that a defendant already has earned *while serving a jail sentence* as a condition of probation"); *Cannon*, 206 Mich App at 657 (emphasizing that good-time credit is earned during the serving of a *sentence*).

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood